

**UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT**

STATE OF VERMONT,

Plaintiff,

v.

EXXON MOBIL CORPORATION,
EXXONMOBIL OIL CORPORATION, ROYAL
DUTCH SHELL PLC, SHELL OIL COMPANY,
SHELL OIL PRODUCTS COMPANY LLC,
MOTIVA ENTERPRISES LLC, SUNOCO LP,
SUNOCO LLC, ETC SUNOCO HOLDINGS LLC,
ENERGY TRANSFER (R&M) LLC, ENERGY
TRANSFER LP, and CITGO PETROLEUM
CORPORATION,

Defendants.

Case No. 2:21-cv-260-wks

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
FIFTH NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants write in response to Plaintiff's Fifth Notice of Supplemental Authority (ECF No. 68), regarding the Third Circuit's decision in *City of Hoboken v. Chevron Corporation*, 2022 WL 3440653 (3d Cir. Aug. 17, 2022) ("*Hoboken*").¹ As Defendants have explained, the Second Circuit's decision in *City of New York v. Chevron Corporation*, 993 F.3d 81 (2d Cir. 2021), is controlling and supports federal jurisdiction here. The Third Circuit's decision in *Hoboken* did not address whether the defendants' claims there actually arose under federal common law. Rather, it treated the defendants' invocation of federal common law as an ordinary-preemption defense that could not support removal under the well-pleaded complaint rule. *Hoboken*, 2022 WL 3440653, at *3. Here, however, Defendants do not invoke federal common law as a defense;

¹ By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

they contend that Plaintiff’s nominally state-law claims to abate fossil fuel emissions necessarily and exclusively arise under the federal common law of transboundary pollution. Decisions from both the Supreme Court and the Second Circuit establish that a plaintiff may not use state-law claims to artfully plead around necessary federal questions. *See* ECF No. 51 at 19–21.

Citing its own precedent, the Third Circuit also ruled that *statutory* complete preemption provides the only doctrinal basis to remove federal common law claims labeled as arising under state law. *Hoboken*, 2022 WL 3440653, at *2–3. But neither the Supreme Court nor the Second Circuit has ever so held, and distinguishing between statutory claims and claims necessarily and exclusively governed by federal common law would lead to bizarre results.² Because the latter claims would proceed in state court, state judges would develop the substantive content of federal common law, subject only to review by the Supreme Court. Through artful pleading and venue selection, plaintiffs could prevent the federal judiciary from developing federal common law in areas implicating uniquely federal interests.

The Third Circuit’s analysis of *Grable* jurisdiction is similarly flawed because it rests on the same fiction that federal common law supplies only an ordinary-preemption defense. *Hoboken*, 2022 WL 3440653, at *3–4. Because “federal common law *alone* governs” Plaintiff’s claims, resolving those claims necessarily requires the resolution of substantial federal questions. *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002) (emphasis in original).

² *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler’s Federal Courts and the Federal System* 819 (7th ed. 2015) (explaining there is “[n]o plausible reason” why “the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law”).

Finally, the Third Circuit's holdings on jurisdiction under the Outer Continental Shelf Lands Act and the federal officer removal statute are erroneous for the reasons explained in Defendants' opposition to Plaintiff's motion to remand. *See* ECF No. 51 at 29–41.

DATED: September 2, 2022

Respectfully Submitted,

/s/ Ritchie E. Berger
Ritchie E. Berger

Ritchie E. Berger
DINSE P.C.
209 Battery Street, P.O. Box 988
Burlington, VT 05401
Tel.: (802) 864-5751
Fax: (802) 862-6409
Email: rberger@dinse.com

Theodore V. Wells, Jr. (*pro hac vice*)
Daniel J. Toal (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Tel.: (212) 373-3089
Fax: (212) 492-0089
Email: twells@paulweiss.com
Email: dtoal@paulweiss.com

Justin Anderson (*pro hac vice*)
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, NW
Washington, DC 20006-1047
Tel.: (202) 223-7300
Fax: (212) 223-7420
Email: janderson@paulweiss.com

Patrick J. Conlon (*pro hac vice*)
Exxon Mobil Corporation
22777 Springwoods Village Parkway
Spring, TX 77389
Tel.: (832) 624-6336
patrick.j.conlon@exxonmobil.com

*Counsel for Defendants Exxon Mobil Corp.
& ExxonMobil Oil Corp.*

/s/ Matthew B. Byrne

Matthew B. Byrne

Matthew B. Byrne

GRAVEL & SHEA

76 St. Paul Street, 7th Floor

Burlington, VT 05401

Tel.: (802) 658-0220

Fax: (802) 658-1456

Email: mbyrne@gravelshea.com

David C. Frederick (*pro hac vice*)

James M. Webster, III (*pro hac vice*)

Daniel S. Severson (*pro hac vice*)

Grace W. Knofczynski (*pro hac vice*)

KELLOGG, HANSEN, TODD,

FIGEL & FREDERICK, P.L.L.C.

1615 M Street, N.W., Suite 400

Washington, D.C. 20036

Tel.: (202) 326-7900

Fax: (202) 326-7999

Email: dfrederick@kellogghansen.com

Email: jwebster@kellogghansen.com

Email: dseverson@kellogghansen.com

Email: gknofczynski@kellogghansen.com

Counsel for Defendants Shell plc (f/k/a Royal Dutch Shell plc), Shell USA, Inc. (f/k/a Shell Oil Company), and Shell Oil Products Company LLC

/s/ Matthew B. Byrne
Matthew B. Byrne

Matthew B. Byrne
GRAVEL & SHEA
76 St. Paul Street, 7th Floor
Burlington, VT 05401
Tel.: (802) 658-0220
Fax: (802) 658-1456
Email: mbyrne@gravelshea.com

Tracie J. Renfroe (*pro hac vice*)
Oliver P. Thoma (*pro hac vice*)
KING & SPALDING LLP
1100 Louisiana Street, Suite 4100
Houston, TX 77002
Tel.: (713) 751-3200
Fax: (713) 751-3290
Email: trenfroe@kslaw.com
Email: othoma@kslaw.com

Counsel for Defendant Motiva Enterprises LLC

/s/ Timothy C. Doherty, Jr.
Timothy C. Doherty, Jr.

Timothy C. Doherty, Jr.
Walter E. Judge
DOWNS RACHLIN MARTIN PLLC
Courthouse Plaza
199 Main Street
Burlington, VT 05401
Tel.: (802) 863-2375
Fax: (802) 862-7512
Email: tdoherty@drm.com
Email: wjudge@drm.com

J. Scott Janoe (*pro hac vice*)
BAKER BOTTS LLP
910 Louisiana Street
Houston, TX 77002
Tel.: (713) 229-1553
Fax: (713) 229-7953
Email: scott.janoe@bakerbotts.com

Megan H. Berge (*pro hac vice*)
Sterling A. Marchand (*pro hac vice*)
BAKER BOTTS LLP
700 K Street N.W.,
Washington, D.C. 20001
Tel.: (202) 639-7700
Fax: (202) 639-7890
Email: megan.berge@bakerbotts.com
Email: sterling.marchand@bakerbotts.com

*Counsel for Defendants Sunoco LP, Sunoco,
LLC, ETC Sunoco Holdings LLC, Energy
Transfer (R&M), LLC, Energy Transfer LP*

/s/ Pietro J. Lynn

Pietro J. Lynn

Pietro J. Lynn
**LYNN, LYNN, BLACKMAN &
MANITSKY, P.C.**

76 St. Paul Street, Suite 400
Burlington, VT 05401
Tel.: (802) 860-1500
Fax: (802) 860-1580
Email: plynn@lynnlawvt.com

Robert E. Dunn (*pro hac vice*)

EIMER STAHL LLP

99 S. Almaden Boulevard, Suite 642
San Jose, CA 95113
Tel.: (408) 889-1690
Fax: (312) 692-1718
Email: rdunn@eimerstahl.com

Nathan P. Eimer (*pro hac vice*)

Pamela R. Hanebutt (*pro hac vice*)

Lisa S. Meyer (*pro hac vice*)

EIMER STAHL LLP

224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Tel.: (312) 660-7600
Fax: (312) 692-1718
Email: neimer@eimerstahl.com
Email: phanebutt@eimerstahl.com
Email: lmeyer@eimerstahl.com

*Counsel for Defendant
CITGO Petroleum Corp.*

CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2022, I caused the foregoing Response to Plaintiff's Fifth Notice of Supplemental Authority to be electronically filed using the Court's CM/ECF system, and service was effected electronically to all counsel of record.

/s/ Ritchie E. Berger
Ritchie E. Berger

DINSE P.C.
209 Battery Street, P.O. Box 988
Burlington, VT 05401
Tel.: (802) 864-5751
Fax: (802) 862-6409
Email: rberger@dinse.com